88-539

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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CASE NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JAMES E. POOLE, JR., ET. AL, APPELLANTS

V.

EMMA GRESHAM, ET AL., PLAINTIFF APPELLEES

JOE FRANK HARRIS, ET AL.,

DEFENDANT APPELLEES

ON APPEAL FROM A THREE JUDGE DISTRICT COURT

OF THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

N. Kenneth Daniel

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Counsel for Appellants

138 pp

QUESTIONS PRESENTED

Whether a State Court Order which, in enforcing previously precleard state election law, enjoins or delays a pending election until such time as state election law is complied with, is subject to preclearance pursuant to Section 5 of the Voting Rights Act 42 U.S.C. 1973c, before such Order may be enforced.

PARTIES TO THE PROCEEDING

The following is a complete list of all parties to the action below which is sought to be reviewed: Emma Gresham, Turetha Neely, Clayton Neely, Jr., Sharon Anfield, Donald Wright, Melvin Streetman, Earl M. Neely, Mary L. Holland, Alvin Lewis, Sr., Nollie Mae Morris and Quinton Gresham, Plaintiffs; Michael J. Bowers, Attorney General of Georgia, Russell N. Sewell, Jr., Executive Counsel to the Governor of Georgia, State Election Board of Georgia, Max Cleland, Secretary of the State of Georgia and Chairman of the State Election Board, Burke County Board of Registrars, Weston Fortson, W. E. Bessent and John M. Moseley, Chief Registrar and members, respectively, of the Board of Registrars, Burke County Board of Elections, and Ralph B. Willis, Michael N. Searles and Morris Green, Chairman and members, respectively, of the Board of

Elections, Defendants; James E. Poole, Jr., William C. Harmon, J. W. Marshall, Fred Muns, Louie B. Way and Julian Kight, Defendant-Intervenors.

TABLE OF CONTENTS

	Page
Questions Presented	1
Parties to the Proceeding	2
Table of Contents	4
Table of Authorities	5
Opinions Below	7
Jurisdiction	8
Constitutional Provisions and Statutes Involved	10
Statement of the Case	17
The Questions are Substantial	26
Appendix Exhibits	48
Certificate of Service	49

TABLE OF AUTHORITIES

CASES	PAGE
1. Allen v. State Board of Elections, 393 U.S. 544 (1969)	27,28,35 36, 40
2. City of Pleasant Grove v. United States, _____U.S. _____, 107 S.Ct. 794 (1987)	27
3. Davis v. Gallinghouse, 246 F. Supp. 208 (E.D. La. 1965)	37,39,40
4. Dunn v. Blumstein, 405 U.S. 330 (1972)	37
5. Gangemi v. Sclafani, 506 F. 2d 570 (C.A. N.Y. 1974)	27
6. Georgia v. United States, 411 U.S. 526 (1973)	27
7. Hathorn v. Lavorn, 457 U.S. 256 (1982)	32,33,34, 35,43
8. Lassiter v. North Hampton County Board of Elections, 360 U.S. 45 (1959)	37

9. NAACP, DeKalb County Chapter v. Georgia, 494 F.Supp. 688 (N.D. Ga. 1980) 27

10. Perkins v. Matthews, 400 U.S. 379 (1971) 27

11. Rome v. United States, 446 U.S. 156 (1980) 27

12. United States v. Louisville Municipal Separate Districts Board of Trustees, 556 F.Supp. 1168 (N.D. Miss. 1983) 35

13. Williams v. Sclafani, 444 F. Supp. 895 (S.D. N.Y. 1977) 30

STATUTES

42 U.S.C. 1973c - 1, 9, 10, 21, 26

42 U.S.C. 1253 - 9, 4

O.C.G.A. 21-3-125 - 14, 38

O.C.G.A. 36-30-13 - 15, 21

Ga. Laws 1890-91 Vol. II,p.657 17

REGULATIONS

28 CFR 51.51 41

28 CFR 51.57 42,44

OPINIONS BELOW

The opinion of the three Judge District Court of the Northern District of Georgia which appears in the appendix hereto as Exhibit 1 is reported at_____F.2d_____ (N.D. GA. 1988).

The opinion and Order of the Superior Court of Burke County, Georgia, enforcement of which was enjoined by the District Court Order referenced above, pending such Order's preclearance, appears in the appendix hereto as Exhibit 2. The Superior Court Order is unreported.

JURISDICTION

This is an appeal from a Three Judge District Court which entered a judgment granting a permanent injunction on June 30, 1988.

A notice of appeal to this Court was duly filed in the United States District Court for the Northern District of Georgia on July 29th, 1988. A copy of the notice of appeal is included in the appendix hereto as Exhibit 3.

This appeal is being docketed in this Court within sixty (60) days from the date of the filing of the notice of appeal in the United States District Court for the Northern District of Georgia and within ninety (90) days from the date of the judgment entered by the Three Judge District Court for the Northern District of Georgia. The jurisdiction of this Court is invoked

under 28 U.S.C. Sec. 1253. Jurisdiction is also specifically conferred pursuant to 42 U.S.C. 1973c.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court.

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect

to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the

District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty

days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty day period which would otherwise require objection in

accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

42 U.S.C. 1253 Direct appeals from decision of three-judge courts.

Except as otherwise provided by law, any aprty may appeal to the Supreme Court from under an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by an Act of Congress to be heard and determined by a District Court of three judges.

O.C.G.A. 21-3-125 Qualification of voters; registration of voters purged from list of electors; determination by governing

authority of method by which registration lists are to be maintained; manner of registration of electors in municipalities maintaining own registration lists.

(a) No person shall vote in any primary or election unless he shall be:

(4) A resident of the municipality in which he seeks to vote, notwithstanding any provision of any municipal charter to the contrary; . . .

(remainder of statute set out in appendix as Exhibit 4).

O.C.G.A. 36-30-13 Special election to fill vacancies on municipal governing authority when all seats are vacant.

Except as provided in subsection (g) of Code Section 21-4-12, in the event that all

seats on the governing authority of a municipality are vacant, the election superintendent of the county in which the municipality is located shall have the authority to call for a special election to fill the vacant offices and to conduct, or to appoint a superintendent of elections for the municipality for the purpose of conducting, the special election. The board of registrars for the county shall prepare the electors list for the special election.

STATEMENT OF THE CASE

The municipality of Keysville, Georgia was incorporated by Act of the Georgia General Assembly on December 29, 1980. At the time of its incorporation, its municipal boundaries were defined as follows: "The corporate limits of said town shall extend one-half mile in every direction from the schoolhouse now located in said town of Keysville". Ga.Laws 1890-91, Vol. II, 657. The boundaries of the town of Keysville have never been changed subsequent to their designation in the Act of Incorporation.

Pursuant to its Act of Incorporation, the municipal government of Keysville consists of a mayor and five council members elected on the first Monday in January of each year. The municipal governing authority of the town of Keysville was elected, served and functioned from 1891

until approximately 1933 when, for some reason, presently unknown, the town ceased holding municipal elections and no such elections were held from approximately 1933 until 1988. The municipal governing authority did not function from approximately 1933 until 1988.

In approximately 1895, the schoolhouse referenced in the Act of Incorporation and from which the municipal boundaries of the town were measured, was destroyed and it is apparently impossible now to properly designate the municipal boundaries of the town of Keysville in accordance with their delineation in the town's Act of Incorporation. Evidence as to the former location of the schoolhouse is substantially conflicting. A State Court sitting in Burke County, Georgia has determined that "the best that can be done is to generalize areas where the lot (on which the schoolhouse was

located) might have been located". (See Exhibit 2, Burke County Superior Court Order dated December 31, 1987). Another Superior Court Judge presiding over a statutory post-election election contest, which election contest challenged the results of the January, 1988 Keysville municipal elections, concluded that "[t]his Court finds that the municipal boundaries of the City of Keysville remain undetermined and uncertain. Based upon the evidence and proceedings to date, it is evident that the boundaries, as conceived by the drafters of the 1890 Act of Incorporation, will never be determined to any degree of accuracy". (See May 23, 1988 Order of Superior Court Judge William F. Grant included in the appendix hereto as Exhibit 5). Any move in the generalized location of the old schoolhouse, which would be the center of town, would substantially affect the number of persons who would be

entitled to vote in any election for the municipal offices of the town of Keysville.

In 1985, notwithstanding the problems in locating and delineating the boundaries of the town of Keysville, certain residents of the town undertook preliminary preparations to reactivate the town by the scheduling of new municipal elections. Before these elections could take place, the Appellants herein filed a petition in the Superior Court of Burke County, Georgia seeking to restrain and enjoin elections scheduled for January 6th, 1986 on the grounds that the elections were not being held in compliance with State law. On January 17, 1986, the Superior Court issued a preliminary injunction enjoining the scheduling or conducting of municipal elections for the town of Keysville until all requirements of State law were met.

In 1987, the Georgia General Assembly

enacted Georgia Laws 1987, p. 1978, O.C.G.A. 36-30-13, which provided a method for holding elections to fill seats on a governing authority of a municipality when all such seats were vacant. The law did not in any way, however, address the municipal boundary issue for the town of Keysville. The Burke County Election Board, thereafter and pursuant to the Act referenced above, called an election to fill the seats on the governing authority of the municipality. The election was scheduled to be held on January 4, 1988. The call for the election was subsequently submitted by the Burke County attorney as chief legal officer of Burke County, Georgia, to the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, for the purpose of preclearing the scheduled elections.

On September 4, 1987, the Burke County

attorney made his original preclearance submission to the Assistant Attorney General for the municipal elections scheduled for January of 1988. At the time of making the original submission, the Burke County attorney noted that "there is also controversy among the parties relative to the boundaries of said municipality". His letter concluded that "we anticipate the Courts will establish the boundaries and order an election"; however, no Court establishment of Keysville boundaries was ever had, nor was any election ordered. On November 5, 1987, the Burke County attorney followed up his original submission with another letter to the Assistant Attorney General and included with that letter a copy of a map which purported to designated the boundaries of the town of Keysville. This designation had been arbitrarily made by a tax commissioner of Burke County, Georgia

who has since discovered deeds which lead him to believe that the boundaries were improperly designated.

On December 3, 1987, the Appellants herein filed a motion to enjoin the County Election Board and Board of Registrars from conducting the scheduled January 4, 1988 elections on the grounds that the boundaries of Keysville had not been determined and consequently, the residents of the town could not be identified. The Superior Court held a hearing on this motion on December 30, 1987 and entered an Order on December 31, 1987 enjoining the January 4, 1988 elections. The Superior Court specifically found that the boundaries which had been submitted for preclearance to the United States Attorney General were not, in fact, the boundaries of the town of Keysville as defined by State law. The Court's injunction was enforcing previously

precleared Georgia Municipal Elections law which required residency within a municipality as a requirement for participation in a municipal election.

The Superior Court concluded that being unable to delineate the boundaries of the town, the Election Board would likewise be unable to determine the residents of the town for purposes of participating in such an election. The Court also specifically determined that entry of its Order did not enact or seek to administer any standard practice or procedure with respect to voting different from that in force or effect on November 1, 1964 and, therefore, the Order was not subject to Section 5 preclearance.

On December 31, 1987, the Plaintiff Appellees herein filed a motion in the District Court for the Northern District of Georgia seeking to enjoin enforcement of the State Court's Order referenced above pending

its preclearance by the United States Attorney General pursuant to Section 5 of the Voting Rights Act. A preliminary injunction was entered on that same day and subsequently, a three judge District Court was convened for the purpose of hearing the Plaintiff Appellees' motion and considering a request for a permanent injunction. On June 30, 1988, the three judge District Court entered a permanent injunction enjoining enforcement of the Superior Court's Order until such time as it had been precleared by the United States Attorney General, pursuant to Section 5 of the Voting Rights Act. Municipal elections were held for the town of Keysville on January 4, 1988 in accordance with the injunction entered by the United States District Court for the Northern District of Georgia.

THE QUESTIONS ARE SUBSTANTIAL

I.

A State Court Order enforcing previously precleared state election law and not changing any voting practice, standard or procedure is not subject to Section 5 preclearance before it may be enforced.

Although the provisions of Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, have been applied to a variety of voting practices or procedures, never have the provisions of that Act been applied to require a State Court order enforcing previously precleared state election law to be precleared before the State Court order might be enforced. The provisions of Section 5 have been applied to the method of electing candidates (at large versus district), the method of selecting officials (election versus appointment), new procedures with respect to qualification and

voting, Allen v. State Board of Elections, 393 U.S. 544 (1969), the method of candidate qualification, Gangemi v. Sclafani, 506 F.2d 570 (C.A. N.Y. 1974), the location of polling places and the annexation of inhabited and uninhabited lands, Perkins v. Matthews, 400 U.S. 379 (1971) and City of Pleasant Grove v. United States,_____U.S._____, 107 S.Ct. 794 (1987), reapportionment of legislative districts, Georgia v. United States, 411 U.S. 526 (1973), changes in the form of government, Rome v. United States, 446 U.S. 156 (1980) and registration procedures for electors, N.A.A.C.P., DeKalb County Chapter v. Georgia, 494 F.Sup. 688 (N.D. GA. 1980). No Court has ever determined, however, that a change in voting procedures subject to preclearance occurs when a State Court enters an injunction prohibiting elections until a municipality complies with

previously precleared state election law.

All of the above referenced changes which have been determined to be subject to preclearance in some form or fashion, change the manner in which elections are or would thereafter be held. As this Court recognized in Allen v. State Board of Elections, 393 U.S. 544 (1969), Congress, in enacting the Voting Rights Act, "intended to reach any state enactment which altered the election law of a covered state". Id. at 566. The only election "alteration" brought about in this case by the State Court's enforcement of municipal residency requirements is, of necessity, a delay of the election from the date originally scheduled to some subsequent date when the requirements of state law had been complied with. Such "change", however, does not alter election procedures, nor is such change a permanent change which would alter

the way in which elections are thereafter held.

The Court below reasoned that by enjoining the January, 1988 elections, the State Court of necessity changed the date on which the elections would be held and that such change in the date of the election requires preclearance approval by the Attorney General pursuant to Section 5. The Appellants herein do not deny that changes in dates of elections are ordinarily required to be precleared. Appellants further recognize that if the State Court's Order were to be enforced, the scheduling of any subsequent special election would have to be precleared with the Attorney General.

The ruling of the Court below which required preclearance of the State Court Order would, when carried to its logical extreme, in effect, completely remove from

State Courts the ability to enforce their own state election laws if, in enforcing those laws, an election was delayed. The Order of the State Court affects a voting practice or procedure only to the extent that it seeks to enforce residency requirements of a statute which has been precleared. In Williams v. Sclafani, 444 F.Supp. 895 (S.D. N.Y. 1977), the Court held that "Section 5 was not intended to cover a change in ... practice ... brought about by a state court decision construing or interpreting an already precleared state voting statute". Id. at 903.

Should this Court allow the decision of the three judge Court to stand, State Courts hereafter, when faced with an obvious violation of previously precleared state election law, would be unable to enforce their own laws, but rather be required to sit idly by and let elections proceed even

if these elections were in obvious violation of state law. Such was not the intent of the Voting Rights Act nor has this Court ever suggested that Section 5 requires such preclearance.

II.

The State Court's Order implements no change in voting which is subject to preclearance, pursuant to Section 5.

The Court below relied heavily on this Court's decision in Hathorn v. Lovorn, 457 U.S. 256 (1982) in support of their decision that the Burke County Superior Court Order here involved is subject to preclearance before it may be enforced. The Hathorn case, however, dealt with a Mississippi Court Order which required compliance by a school board with certain election procedures that had been set out in a state statute, which statute had been ignored and unenforced by the school board since the statute's enactment in 1964. It is unquestioned that the underlying statute which was sought to be enforced in Hathorn was, in and of itself, subject to preclearance pursuant to the

provisions of Section 5 of the Voting Rights Act and that the statute had not been precleared at the time the Mississippi Courts sought to order its enforcement. As Justice O'Connor noted in the opinion of this Court in the Hathorn case, certiorari was granted to decide "whether a state court may order implementation of a change in election procedure over objections that the change is subject to preclearance under Section 5 of the Voting Rights Act of 1965". Id. at p. 257 (emphasis added). As pointed out by Justice O'Connor, it is not the State Court order itself that this Court required to be precleared, but rather the underlying "change in election procedure" that would have been brought about by enforcement of the State Court order.

In this case there is, however, obvious absence of any ordered change of election procedure. As noted earlier, the

only change is the delay of a previously scheduled election. Once state law has been complied with, a special election could then be called. This special election and its date would have to be precleared by the Attorney General's office However, this special election would be carried out pursuant to the same election rpocedures as would have been used initially. No changed election procedure would be effected by enforcement of the Burke County Superior Court Order.

Hathorn is also distinguishable in that, as noted in this Court's decision, no one disputed that the changes in election procedures ordered by the Mississippi Courts were "procedures" subject to preclearance pursuant to Section 5. As noted on remand, "[t]he controversy precipitating this legal battle centered around whether the method of selecting the school board would be

changed". United States v. Louisville Municipal Separate District, Board of Trustees, 557 F.Supp.1168 (N.D. MISS. 1983) at 1169. In this case, no such "change" was ordered by the Superior Court. Had the Superior Court's Order in this case dictated that all Keysville municipal elections would, thereafter, be held on a different date, that Order would be subject to preclearance. The obvious distinction in the facts of this case, when compared with the facts in Hathorn, is that the Mississippi Courts in Hathorn sought to order a change in election procedure, whereas the Court in this case sought only to enforce previously precleared state law. The Court's Order here in issue does not in any way alter the election law or procedure of Keysville.

As noted by this Court in Allen v. State Board of Elections, 393 U.S. 544

(1969), in order for preclearance to be required, there must be a "new procedure with respect to voting", which procedure "is different from the procedure in effect when the state became subject to the Act". Id. at 570. No such new procedure would be brought about by enforcement of the State Court injunction. All elections occurring in Keysville after the injunction would be held pursuant to the same "standards, practices or procedures" as existed before enforcement of the injunction.

III.

The residency requirement sought to be enforced by the Superior Court is a legitimate, precleared requirement of Georgia law for participation in Georgia municipal elections.

It is unquestioned that residency is a legitimate requirement for participating in an election. "Residency is a fundamental, positive requirement for voting in an area ...". Davis v. Gallinghouse, 246 F.Supp. 208 (E.D. LA. 1965) at 216. The Court has specifically held that a residency requirement is a factor which a state may unquestionably take into consideration in determining the qualification of voters. Lassiter v. North Hampton County Board of Elections, 360 U.S. 45 (1959). In the case of Dunn v. Blumstein, 405 U.S. 330 (1972), at 343, this Court stated:

> We have in the past noted approvingly that the states have the power to require that voters be bona fide residents of the relevant political subdivisions. An appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny.

Pursuant to the provisions of the Georgia Municipal Elections Code cited herein (O.C.G.A. 21-3-125), residency is a positive requirement for participation in a Georgia municipal election. The statute requiring residency was adopted subsequent to November 1, 1964, but has been precleared pursuant to the provisions of Section 5 of the Voting Rights Act.

Without the benefit of a positive delineation of the municipal boundaries for the town of Keysville, in accordance with the Act of Incorporation, no clear determination can be made as to who is entitled to participate, either as a

candidate or as an elector in any such election. As noted in the findings of fact of the Burke County Superior Court Order, at best, only a generalization of the center of town could be made and based on the movement of the center of town, there would be a substantial change, in terms of percentage, in the number of persons authorized to participate in any such election.

As pointed out in Davis v. Gallinghouse, 246 F.Supp. 208 (E.D. LA 1965) at 216, "a man's rights are valuable only insofar as they are protected. One of the ways to do this is by careful scrutiny of those who assert those rights, to insure that the assertor is indeed entitled to them, lest the rights of the true owners be diluted by the claim of fraud". The Davis Court thereafter noted that part of the right to vote is "the right not to have your vote diluted by the vote of those who are

unqualified". Id. at 216. This Court has also noted that "[t]he right to vote can be affected by a dilution of voting power, as well as by an absolute prohibition on casting a ballot". Allen v. State Board of Elections, 393 U.S. 544 (1969) at 569.

In protecting the rights of the true residents of the municipality of Keysville, therefore, the Superior Court was forced to enjoin the scheduled elections until municipal residency could be determined. In accordance with the above cited authority, a shotgun approach to defining municipal boundaries would not be adequate to protect the voting rights of the true residents of Keysville. The Superior Court's Order enforcing this residency requirement should not be subject to preclearance merely because by enforcing the municipal residency requirement, the Court was forced to delay municipal elections.

IV.

There is no changed voting standard, practice or procedure which could be considered by the Attorney General or a reviewing Court, nor any standards which could be used by the Attorney General or a reviewing Court for considering preclearance of the Burke County Superior Court Order, if such preclearance is required.

The Attorney General has promulgated regulations setting out the factors that the Attorney General considers relevant and the standards by which the Attorney General will be guided in making any Section 5 determinations and in defending Section 5 declaratory judgment actions. See 28 C.F.R. 51.51, et seq. Generally, as set out in those regulations, the Attorney General, when considering any submission for preclearance, seeks to determine whether the submitted change has the purpose of or will

have the effect of denying or abridging the right to vote on account of race, color or membership in a language minority group. As set out in 28 C.F.R. 51.57, the relevant factors used by the Attorney General in making determinations with respect to submitted changes are as follows:

> (a) The extent to which a reasonble and legitimate justification for the change exist;
> (b) The extent to which the jurisdiction followed objective guidelines and fair and conventional procedures in adopting the change;
> (c) The extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change; and
> (d) The extent to which the jurisdiction took the concerns of members of racial and laguage minority groups into account in making the change.

In light of the standards set out above, it is obvious that the Attorney General has never envisioned being required to preclear a Superior Court's Order which enforces

previously precleared state law. Under the facts in Hathorn, however, it would be easy to see where the Attorney General could use the above cited standards in determining whether the underlying statute which the Mississippi Courts ordered enforced should or should not be precleared.

In this case, by applying the statutes referenced above, the Attorney General would basically be called upon to second guess a Superior Court Judge and the remedy which the Judge chose to use in enforcing precleared election law. It would seem impossible for the Attorney General to determine whether in this case legitimate justification existed for the Burke County Superior Court's Order. That would obviously be a duty of an appellate court, not the Attorney General. It would also be impossible, if not unconstitutional, for the Attorney General to consider the extent to

which the Burke County Superior Court had afforded members of racial and language minority groups an opportunity to participate in its decision. It is ludicrous to suggest that a Court would or should, under any set of circumstances, allow such participation in the judicial decision making process. Finally, it cannot be rationally argued that the Burke County Superior Court's Order should be evaluated by the Attorney General in light of the extent to which the Court "took the concerns of members of racial and language minority groups into account" in making the decision. 28 C.F.R. 51.57(b).

As noted from the above, there is in this case an obvious absence of any change in election rpocedure that could be evaluated by the Attorney General of the District Court for the purpose of determining whether to preclear the State Court's order.

V.

CONCLUSION AND SUMMARY

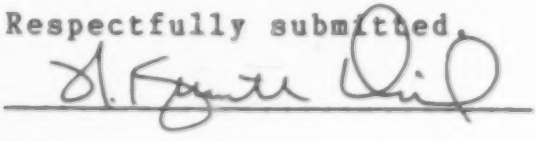
The Burke County Superior Court's Order of December 31, 1987 is an Order merely seeking to enforce previously precleared State election law. The Order does not alter, amend or change any election standard, practice or procedure and all elections which would be carried out in the municipality of Keysville subsequent to the Court's December 31, 1987 Order, would be carried out in accordance with the same standards, practices or procedures as hexisted prior to the Court's Order.

The Superior Court Order merely seeks to enforce a municipal residency requirement of Georgia state election law and to require that an accurate determination of municipal residency be made in accordance with State law before elections can be held. The residency requirement of Georgia

municipal election law is a legitimate requirement, consideration of which this Court has long recognized and authorized.

Allowing the Order of the three-judge District Court below to stand would, in essence, severely restrict a State Court's ability to enforce its already precleared election law. In addition, it is obvious that the standards by which the Attorney General uses to determine preclearance are not at all appropriate for reviewing Court Orders enforcing previously precleared state election law. For the reasons set forth above, Appellants respectively request that this Court reverse the ruling of the three-judge District Court and allow enforcement of the Burke County Superior Court's Order.

Respectfully submitted,



N. Kenneth Daniel
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APPENDIX

1987.

/s/ Albert M. Pickett

Presented by: JUDGE, SUPERIOR COURT,

N. Kenneth Daniel AUGUSTA JUDICIAL CIRCUIT

Attorney for

Plaintiffs

505 Courthouse Lane

Augusta, Georgia 30901

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT,
FOR THE NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

EMMA GRESHAM, ET AL.,	)	
Plaintiffs	)	CIVIL ACTION NO.
v.	)	1:87-CV-867-JOF
JOE FRANK HARRIS,	)	
ET AL.,	)	
Defendants	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that JAMES E. POOLE, JR., WILLIAM C. HARMON, J. W. MARSHALL, FRED MUNDS, LOUIE B. WAY, and JULIAN H. KIGHT, Defendant intervenors in this action, do hereby appeal to the Supreme

Court of the United States from the Final Order of the three Judge District Court convened in this action, which Order granted the Plaintiffs' motion for a permanent injunction and which Order is dated and was filed in this action on June 30, 1988 and was entered on the docket on July 8, 1988.

This appeal is taken pursuant to 28 U.S.C. Sec. No. 1253.

This 28th day of July, 1988.

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/s/ N. Kenneth Daniel
N. KENNETH DANIEL
As attorney for Defendant intervenors

EXHIBIT 4

21-3-125. Qualifications of voters; reregistration of voters purged from list of electors; determination by governing authority of method by which registration lists are to be maintained; manner of registration of electors in municipalities maintaining own registration lists.

(a) No person shall vote in any primary or election unless he shall be:

(1) Registered as an elector in the manner prescribed by law;

(2) A citizen of this state and of the United States;

(3) At least 18 years of age;

(4) A resident of the municipality in

which he seeks to vote, notwithstanding any provision of any municipal charter to the contrary; and

(5) Possessed of all other qualifications prescribed by law.

(a.1) (1) No person who has been convicted of a felony involving moral turpitude may register, remain registered, or vote except upon completion of the sentence.

(2) No person who has been judicially determined to be mentally incompetent may register, remain registered, or vote unless the disability has been removed.

(b) Any person who possesses the qualifications of an elector except those concerning age shall be permitted to register to vote if such person will acquire such qualifications within six months after the day of registration; provided, however, that such person shall not be permitted to vote in a primary or election until the

acquisition of such qualifications.

(c) Notwithstanding any other provision of this article, any person who was qualified and registered to vote on September 1, 1968, shall not be required to reregister under the terms of this article unless such person shall have become or becomes disqualified to vote by reason of having been purged from the list of electors or for any other reason whatsoever, in which event such person shall, in order to become registered to vote, reregister under the terms of this article.

(d) The governing authority of any municipality may be charter, ordinance, or resolution elect either to maintain its own registration or to provide for the city to use the county registration list, stating that any person who is a resident of the municipality and who is registered as an elector with the board of registrars of the county shall be eligible to vote in a

municipal primary or election. If the municipality elects to maintain its own registration list, the municipality shall use the form of the registration card and the questions to be propounded to an applicant as prescribed in Code Section 21-2-217. The qualifications of a person seeking to vote in a municipal primary or election shall be determined by this chapter and the Constitution of Georgia. Provided, however, municipalities which are the county seats of counties having populations of not less than 32,500 and not more than 34,100 according to the United States decennial census of 1970 or any future such census shall not be authorized to maintain their own registration lists but shall use the registration list of the county and such county shall be required to furnish such

list to the municipality. Provided, further, that any such counties shall be required to furnish a list of the registered voters residing within such municipalities to the governing authorities of the muncipalities no later than seven days before any election or primary covered by this chapter is to be held in such municipalities.

(e) In a municipality maintaining its own registration list, any person desiring to register as an elector shall apply to a registrar or a deputy registrar and shall furnish such officer with proper identification and information which will enable him to fill in all blanks appearing on the registration card. When any person who seeks to register as an elector is asked to provide proper identification by a registrar or a deputy registrar, as required by law, it shall be sufficient for the

applicant to exhibit his valid driver's license, birth certificate,credit card, food stamp card, social security card, check-cashing card, passport, school record, work identification record, utility bill, school identification, certified copy of marriage license, or Medicaid, medicare, or welfare identification. On completion of the form, the officer shall administer the oath to the applicant and then have him sign it, and the officer shall attest it. Upon request of the applicant, the officer taking the application shall read or repeat the oath distinctly to the applicant; and, if the applicant cannot sign his name, the officer shall sign it for him, the applicant making his mark thereto.

EXHIBIT NO. 5

IN THE SUPERIOR COURT OF BURKE COUNTY

STATE OF GEORGIA

IN RE: CONTEST OF)	
ELECTION RESULTS OF)	CIVIL ACTION NO.
THE KEYSVILLE)	88-V-21
MUNICIPAL ELECTIONS)	
HELD JANUARY 4, 1988.)	

ORDER

This case is presently before the Court on an election contest from the election conducted in Keysville, Burke County, Georgia, on January 4, 1988. The primary issue of the contest, as well as of all proceedings leading up to the subject election and contest, involves a question of the location of the municipal boundaries of

the city of Keysville.

FINDINGS OF FACT

1. Factual History of the Dispute

The City of Keysville, Georgia was incorporated in 1890 pursuant to Georgia Law 1891-91, Vol. II, p. 657, No. 246, Sec. II. This act directed that the boundaries of the city would extend one-half mile in every direction from the schoolhouse which was then located in the town of Keysville. This schoolhouse, known as the "Academy", was destroyed in approximately 1895. The boundaries have not been charged or redesignated since that date, although problems with the location of the boundaries apparently existed as early as 1891, shortly after the incorporation. This fact is evidenced by an article in the March 7, 1891 edition of the True Citizen, the legal organ of Burke County, entitled "Trouble at Keysville", which indicated that the town

limits as noted in the act of incorporation "were not sufficiently circumscribed."

The incorporating act also provided that the municipal government, consisting of one mayor and five councilmembers, would be elected "on the first Monday in January, 1891, and on the same day annually thereafter an election shall be held in said town for mayor and councilmen, whose term of office shall be for one year....No one shall vote for or be eligible to said offices of mayor and councilmen who is not a bona fide citizen of said town...." (Emphasis in text) The last election was held in approximately 1933. No definite reason is offered or known as to why no elections have been held in the city since that date. The offices of the municipal government have, therefore, been vacant since approximately 1933.

There are approximately 165 registered

voters in Keysville, a majority of whom are black. For several years, a number of black residents, some of whom are parties to this litigation, tried to reactivate the municipal government.

Beginning in or about 1985, two committees were formed and met concerning the reactivation of the Keysville municipal government. The committees were called the "Steering Committee for the Reactivation of Town Government" and the "Committee to Reactivate the Municipal Government for the Town of Keysville." The members of the two committees were residents of the locality in and around the township of Keysville. The committees sought to reestablish the municipal government for the purpose of securing municipal services such as water, sewage, and other services, as well as fire and police protection, which were not previously available.

The Georgia Municipal Code Sec. 21-3-408(b) provides that in the event of vacancy in municipal offices, and if the municipal charter fails to provide a method for filling the vacancy, "the governing authority shall thereupon call a special election to fill such a vacancy." Also, O.C.G.A. Sec. 21-3-8(3) provides that all municipal elections shall be conducted by the "superintendent, registrars, deputy registrars, poll officials, and other employees" selected by the governing authority. Neither of these routes were available to the citizen groups, however, as there was no existing governing authority.

At the request of the citizens' groups, the Burke County Attorney, Mr. Preston Lewis, Jr., on behalf of the Keysville residents, contacted the Georgia Attorney General's office for advice as to how they might reactivate the municipal government.

The Assistant Attorney General, Mr. Hugh Jeffrey Lanier, responded by letter, dated August 2, 1985, and advised the citizen committees that the following methods of action were available to them:

(a) Request the Governor to appoint persons to fill the existing vacancies;

(b) File an action in the Superior Court to declare the offices vacant so that the Governor could appoint persons to fill the existing vacancies;

(c) Conduct a "town meeting" to elect temporary officers for the purpose of holding an election; and

(d) Request the General Assembly to provide by local act temporary officers and a method of election for permanent officers.

The Georgia Constitution, Article V, Sec. II, Para. VIII provides that "[w]hen any public office shall become vacant by

death, resignation, or otherwise, the Governor shall promptly fill such vacancy unless otherwise provided by this Constitution or by law." In this case, however, the Governor has, on the advice of Mr. Lanier and the Governor's Executive Counsel, refused to make such appointments due to the uncertainty of the municipal boundaries. There is no evidence in the record that an action was ever filed in the Superior Court to delcare the offices vacant.

On September 9, 1985, a town meeting was had in accordance with Mr. Lanier's instructions. Turetha Neeley and Upton Cochran were elected to explore the legal requirements for reestablishment of the active government, and were later elected co-superintendents of elections and given the oath of office by the Probate Judge of Burke County. A special election was set

for January 6, 1986, and they began publishing notices concenring the election in the True Citizen.

The following persons qualified and ran for office:

Emma Gresham - Mayor

Clayton Neely, Jr. - Councilmember

Sharon Anfield - Councilmember

Donald Wright - Councilmember

Melvin Streetman - Councilmember

Earl M. Neely - Councilmember

None of the above-named individuals were opposed in the election, therefore, on December 30, 1985, after the qualifying period had closed, these persons were declared elected and the oath was administered to them by the Probate Judge of Burke County.

It was at or about this point that the litigation concerning these matters began. But before discussing the procedural history

of this case, it is appropriate to examine the difficulties which have arisen in determining the municipal boundaries of the city of Keysville.

A number of persons have attempted to define the municipal boundaries through various means. In early 1985, it is alleged that Herman Lodge and unknown others were seen posting signs immediately outside the current residential areas of the township of Keysville which purported to represent the town limits.

The most extensive research was conducted by Mr. James Bailey, the Chief Appraiser and Tax Assessor for Burke County. Mr. Bailey began his independent research after having been asked by the County Commissioners to assist some lawyers in determining the city boundaries. Mr. Bailey prepared a map, from which the voters list would later be prepared for the January 4,

1988 election, based upon the following documents:

1. Deed from L. A. Clarke to Thomas B. Daniel, dated April 7, 1890 and recorded in Deed Book V, pp. 77-8.

2. Deed from Thomas P. Daniel to Augusta Glass Works, dated April 9, 1890 and recorded in Deed Book V, pp. 77-8.

3. Deed from Augusta Glass Works to S. M. Whitney, dated August 31, 1983 and recorded in Deed Book X, pp. 444-45.

4. Deed from Phil P. Johnston to the Trustees of the Methodist Church, dated November 22, 1894 and recorded in Deed Book 5, p. 483.

5. Plat of the town of Keysville prepared by Matthew S. Lively, dated September, 1906, File No. A-3427.

It is important to note that Mr. Bailey's search was for the location of the Academy lot, not the school itself. The

incorporating act set the measure of the city boundaries from the location of the schoolhouse. Mr. Bailey's estimates were taken from the center of what he purported to be the location of the Academy Lot. Even then, Mr. Bailey has admitted, he has not been able to, nor could he, determine the exact location of the schoolhouse.

In June of 1987, Mr. John Murphy, a Special Assistant Attorney General was employed by Mr. Lanier to examine the title records at the Burke County Clerk's Office. The Georgia Attorney General's office staff also met with Keysville citizens in this regard and interviewed a longtime citizen, Mr. Henry Key. Still, they were unable to ascertain the precise location of the schoolhouse, but did reach a determination as to a generalized location. This generalized location was at a point some 200 feet west and 200 feet south of the location

designated by Mr. Bailey.

Mr. Henry Key, a longtime resident of Keysville, having been born there on January 8, 1895, has in his affidavit stated that based upon conversations with his parents and other residents, the Keysville Academy, then a school for whites, stood just northeast of the present location of the Keysville Methodist Church, next to a grove of large oak trees. This would place the Academy's location some 250 feet northeast of the location designated by Mr. Bailey.

A memorandum was located by Ms. Opal A. Davis, the former secretary of the Keysville United Methodist Church, a memorandum which she states she prepared, indicating that a tornado struck Keysville in the late 1890's during which all of part of the Church roof was blown off, that it was in the daytime, because the nearby school was severely damaged and members' children were involved.

This memorandum supports the earlier assertions of Mr. Key.

Finally, Mr. James Smith, the Burke County School Superintendent, located a deed in the Burke County Board of Education files which apparently had never been recorded at the Burke County Courthouse. This deed purports to convey the Academy Lot. The deed gives a generalized description of the property which is consistent with at least one of the deeds relied on by Mr. Bailey, but is inconsistent with others. This deed would appear to move the location of the Academy southwest of the location designated by Mr. Bailey.

In early 1987, Mr. Lanier prepared and presented House Bill 185 amending Chapter 30, Title 36 of the Official Code of Georgia Annotated, adding a new code section 36-30-13 which read "...in the event that all seats on the govenring authority of a municipality are vacant, the elections

superintendent of the county in which the municipality is located shall have the authority to call for a special election to fill the vacant offices and to conduct, or to appoint a superintendent of elections for the municipality for the purpose of conducting, the special election. The Board of Registrars for the county shall prepare the electors list for the special election."

In August of 1987, Mr. Lanier, in an opinion to the State Elections Director, stated that it is the duty of the County Elections Superintendent to call such a special election to fill vacancies and he shall be required to do so. This opinion was communicated to Ralph B. Willis, Burke County Board of Elections Superintendent. Mr. Lanier further advised that "based upon the investigation conducted by our office in

reviewing deed records and maps, and interviewing elderly citizens...the boundaries appear capable of being sufficiently fixed as to determine the electors of the Town of Keysville...[and that] the Board of Registrars of Burke County is required to prepare an electors list for the special election."

Mr. Willis then contacted the Burke County Attorney, Mr. Lewis, who arranged for him to receive a map from the County Property Tax Office which purported to delineate the city boundaries. This was the map prepared by Mr. James Bailey, mentioned earlier. This map was used to compile a list of electors. Mr. Willis, pursuant to the instructions of Mr. Lanier and O.C.G.A. Sec. 36-30-13, called a special election for January 4, 1988. The voters list, map, and call for the election were then submitted to the United States Attorney General's office

for preclearance under Section 5 of the Federal 1965 Voting Rights Act (infra) and the same were precleared on December 9, 1987.

On January 4, 1988, the elections were conducted. And it is from these elections that the case before this Court arose.

2. Procedural History of the Dispute

A. Burke County Superior Court, Poole, et al., Civil Action No. 85-V-414. This action was filed on December 31, 1985. At that time the Defendants were seeking to schedule and conduct municipal elections. The Plaintiffs sought to enjoin these elections on the grounds that:

(1) the municipal boundaries were inexact; and

(2) the scheduling had not been done in compliance with the Georgia Municipal Election Code.

Prior to the filing of this action, on

December 31, 1985, the Plaintiffs sought and obtained a Temporary Restraining Order. The Court, in granting the temporary restraining order, made the following findings of fact: (a) No proper election superintendent had been elected according to law; (b) There existed no defined municipal boundaries from which a list of certified electors could be drawn, candidates qualified, or electors qualified; (c) The requirements of the Georgia Municipal Election Code had not been met or followed concerning scheduling of elections or concerning the qualifications of candidates; (d) There had been no proper scheduling of the municipal election; and (e) There had been no property qualification of candidates. Therefore, the Court restrained and enjoined the defendants from taking any actions regarding the scheduling or conducting of municipal

elections until all requirements of the Georgia Municipal Elections Code had been met. Further, he gave the defendants until 2:30 p.m. on January 6, 1986 to show that proper procedures had been taken or he would issue a preliminary injunction.

On January 17, 1986, the Court issued a Preliminary Injunction repeating the findings and restraints of the Temporary Restraining Order.

On December 3, 1987, the Plaintiff's entered a Motion for Contempt, Motion to Add a Party Defendant, and Motion to Expand the Preliminary Injunction. In this motion, the Plaintiffs admit that the new O.C.G.A. Sec. 36-30-13 (cited previously) cleared up the questions of the scheduling of the elections, however, claimed that the boundary issue still remained to bar the holding of the elections. Further, the Plaintiffs informed the Court that Mr.

Willis, of the Burke County Board of Registrars, was planning to conduct elections on January 4, 1988. They therefore sough to add Mr. Willis as a party defendant to that action. A hearing was held on this Motion on December 30, 1987.

On December 31, 1987, the Court issued an order adding Ralph B. Willis, as Superintendent of Burke County Board of Elections, as a party defendant. The Court further enjoined the elections scheduled for January 4, 1988 holding that the defendants were enjoined and restrained from undertaking any actions regarding the scheduling or conducting of municipal elections until the municipal boundaries had been properly delineated in accordance with the law. The Court also found that the requirements for preclearance and approval under Section 5 of the 1965 Federal Voting Rights Act were not applicable to its order because the Court's order did not "enact or

seek to administer any standard or procedure with respect to voting different from that in force or effect on October 1, 1964." Further, the Court held that its order did not change the boundaries as submitted to the United States Attorney General for preclearance according to Section 5, "but rather determines that the location of those boundaries is not supported by the evidence."

B. United States District Court, Northern District of Georgia, Gresham, et al., No. C87-867A. This action was filed on April 29, 1987 seeking declaratory and injunctive relief against state officials and agencies for failure to appoint persons to fill vacancies or conduct elections for the municipal government of Keysville, and for failure to enforce the provisions of the 1st, 13th, 14th and 15th Amendments of the U.S. Constitution and Sections 2 and 5 of

the Voting Rights Act of 1965, 42 U.S.C. Secs. 1973 and 1973c. Plaintiff's complaint alleges that "Defendant's refusal to fill the existing vacancies...is a standard, practice, or procedure with respect to voting different from that previously in force or effect within the meaning of Section 5, that may not be implemented without prior approval of the Attorney General or the United States District Court of the District of Columbia.

On December 30, 1987, the Plaintiffs submitted a Motion for Temporary Restraining Order and a Preliminary Injunction restraining and enjoining implementation of the Burke County order issued orally that same date absent compliance with the preclearance provisions of Section 5 of the Voting Rights Act. The motion was granted.

On December 31, 1987, Plaintiffs in the Burke County action sought to intervene, and

their application was granted.

After a hearing on January 14, 1988, before a three judge panel, the preliminary injunction was granted. The panel ruled that a state court may not stop an election, or change an election date, without preclearance under Section 5 of the 1965 Voting Rights Act. No written order or opinion has yet been issued in that case.

C. Challenge of Election to Burke County Board of Registrars 1/4/88.

The elections took place on January 4, 1988. On that same day, Joseph Cochran, Sr. and his wife challenged 41 voters, 21 of whom actually voted in the election on the grounds that the boundaries of the city had not been determined and that the residency of the voters could not be established. Their challenges were heard by the Board of Registrars after the polls closed and were denied. No appeal was made of this

decision.

The election was held as scheduled. The results of the election were as follows, broken down by candidate, race of candidate, and number of votes received:

MAYOR Gresham (bl) - 75 Cochran (Wh) - 65

Council

Post 1	Poole (Wh) - 67	Rucker (Bl) - 65
Post 2	Lewis (Bl) - 78	Padgett (Wh) - 64
Post 3	Holland (Bl)-79	Munns (Wh) - 64
Post 4	Morris (Bl) -78	Terrell (Bl) - 64
Post 5	Neely (Bl) - 74	Russell (Wh) - 68

Each race was decided by a margin of less than the number of challenged voters who actually voted. Two of the candidates elected, Mary Holland and Nollie Mae Morris, reside within the boundaries as delineated by Mr. Bailey on the map used, but would reside outside the boundaries if based on the location indicated by the unrecorded schoolhouse deed.

D. Burke County Superior Court, In re: Contest of Election Results of the Keysville Municipal Elections held Jan. 4, 1988, Civil Action No. 88-V-21. This action was filed on January 25, 1988. It was origianlly submitted as a Petition to Emma Gresham, Mayor elect, Ralph B. Willis, Burke County Elections Superintendent, the Burke County Board of Registrars and the Burke County Superior Court. The governing authority, however, at a meeting of the town council conducted on January 13, 1988 found that O.C.G.A. Sec. 21-31-420 required that all members of the governing authority disqualify themselves from judging the contest. This decision was appealed to the Superior Court of Burke County, and came before this Court as a result of an Executive Order issued by the Governor of the State of Georgia, the Honorable Joe Frank Harris, dated February 29, 1988.

This action is premised on the following grounds:

(1) That illegal votes have been received sufficient to change or place in doubt the results of the election;

(2) That certain candidates elected are ineligible for office because they are not residents of the municipality; and

(3) That the municipal boundaries "are indeterminable to such an extent that it is impossible to determine conclusively which electors are entitled to vote at the municipal elections and which persons are entitled to offer as candidates for the municipal elections."

CONCLUSIONS OF LAW

The nomination, election, or eligibility of any person seeking nomination, having been nominated, or elected may be contested by any person who was a candidate at such primary or election

or by any aggrieved elector who was entitled to vote for such person. O.C.G.A. Sec. 21-2-521. The grounds for such contest may be as follows:

(1) Misconduct, fraud, or irregularity by any primary or election official(s) sufficient to change or place in doubt the result;

(2) When the defendant is ineligible for the nomination or office in dispute;

(3) When illegal votes have been received or legal votes rejected at the polls sufficient to change or place in doubt the result;

(4) For any error in counting the votes or declaring the result of the primary or election, if such error would change the result; or

(5) For any other cause which shows that another was the person legally nominated, elected or eligible to compete in

a run-off primary or election. O.C.G.A. Sec. 21-2-522.

The United States Congress has adopted, and this State and its political subdivision are subject to, the Federal Voting Rights Act of 1965, 42 U.S.C. Sec. 1973(c) which states that whenever a State or political subdivision shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the U.S. District Court for the District of Columbia for a declaratory judgment that such does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color or may submit same to the Attorney General of the United States for approval.

DISPOSITION

This Court finds that all questions presented to it in the course of this election contest have been previously litigated, as noted in the foregoing findings of fact, and continue to be litigated both in Burke County Superior Court, Civil Action No. 85-V-414, and U.S. District Court, Case No. C87-867A. This dispute does not concern matters regularly the subject of an election dispute, but rather surrounds the issue of the municipal boundary.

This Court further finds that the municipal boundaries of the City of Keysville remain undetermined and uncertain. Based upon the evidence and proceedings to date, it is evident that the boundaries as conceived by the drafters of the 1890 Act of Incorporation will never be determined to any degree of accuracy or certainty. What

the people of the township of Keysville require is bold legislative action on the part of their representatives to re-define and establish the municipal boundaries in such a manner as will satisfy all parties to this litigation. Such action is, however, purely legislative and not within the reach of this Court's power and authority.

Therefore, it is the finding and judgment of this Court that based upon the map and voter's list as submitted by the Burke County Board of Registrars and precleared and approved by the United States Attorney General, the results of the election of January 4, 1988 are confirmed. This finding and order, however, shall not become effective for a period of not more than thirty (30) days from the date of this order, during which time this Court requests and directs the Office of the Attorney General of the State of Georgia to take

such actions as necessary to seek preclearance and approval under Section 5 of the 1965 Voting Rights Act of the December 31, 1987 order issued by the Superior Court of Burke County in the case of Poole v. Lodge, Civil Action No. 85-V-414.

This Court does take notice of and has received the Motion to Dismiss the Election Contest Petition filed by respondent, Mayor Emma Gresham. This motion is moot because of the Court's present ruling.

IT IS SO ORDERED:

This 23rd day of May, 1988.

/s/ William F. Grant

WILLIAM F. GRANT, Chief Judge
Superior Court, Northern
Judicial Circuit

CERTIFICATE OF SERVICE

The undersigned, counsel of record for the Appellants herein, hereby certifies that service of the within and foregoing jurisdictional statement was made on the 26th day of September, 1988 by depositing, in the United States Post Office with first class postage prepaid to each addressee (counsel of record) named below, three copies of this jurisdictional statement, all in accordance with the provisions and requirements of Rule 28, specifically 28.3 and 28.5 of the Rules of the Supreme Court. The counsel of record served with this jurisdictional statement are as follows:

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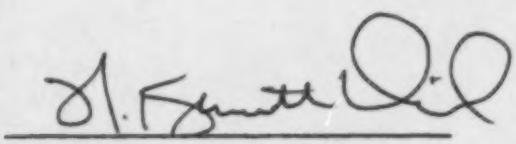
The undersigned further certifies that by service upon the counsel of record named above, all parties required to be served, have been served.



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(2)

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

JAMES E. POOLE, JR., ET. AL.,

Appellants,

v.

EMMA GRESHAM, ET. AL.,

Appellees.

ON APPEAL FROM A THREE-JUDGE PANEL OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 2

ARGUMENT 5

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES CITED:

Allen v. State Board of Elections, 393 U.S. 544 (1969) 6

Dougherty County Board of Education v. White, 439 U.S. 32 (1978) 6

Georgia v. U.S., 411 U.S. 526 (1973) 6

Hathorn v. Lovorn, 457 U.S. 255, 265 (n.16)(1982) 6

NAACP v. Hampton County Election Commission, 470 U.S. 166, 178 (1985) 7

Perkins v. Matthews, 400 U.S. 379 (1971) 6

U.S. v. Board of Commissioners of Sheffield, Alabama, 435 U.S. 110 (1978) 6

STATUTES CITED:

42 U.S.C. § 1973c 3, 5

O.C.G.A. § 36-30-13 3

No. 88-539

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ON APPEAL FROM
A THREE-JUDGE PANEL OF THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

The State Defendants-Appellees, Joe Frank Harris, Michael J. Bowers, Russell N. Sewell, Max Cleland, and State Election Board, and the Local Defendants-Appellees, Burke County Board of Registrars, Weston Fortson, W. E. Bessent, John M. Moseley, Burke County Board of Elections, Ralph B. Willis, Michael M. Searles, and Morris Green, move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the three-judge panel of the United States District Court of the Northern District of Georgia on the ground that it is manifest that

the question presented by this appeal is so unsubstantial as to need no further argument.

I.

STATEMENT OF THE CASE

The Town of Keysville, located in Burke County, Georgia, was incorporated in 1890 with corporate limits extending one-half mile in every direction from the schoolhouse located there. Ga. Laws 1890-91, Vol. II, p. 657. The schoolhouse upon which the boundaries was established was destroyed in approximately 1895. There is apparently no living person who knows where the old schoolhouse was located in 1890. The charter for the Town of Keysville requires that a mayor and five councilmembers be elected for one-year terms on the first Monday in January of each year.

At some point during the 1930's the Town of Keysville ceased to elect persons to fill these municipal offices. Consequently, the government of the Town of Keysville remained inactive for many years despite the fact that Keysville continues to be a current municipality in the State of Georgia. In approximately 1985, numerous citizens of the Town of Keysville began efforts to reactivate the municipality. Due to the fact that the laws of the State of Georgia did not contemplate a situation such as the one existing in the Town of Keysville in which the town simply decided to cease performing governmental functions, the citizens of the Town of Keysville experienced difficulty in restarting the municipality.

In 1987, the Georgia Assembly enacted a law to deal with the situation existing in Keysville. Ga. Laws 1987, p. 178. That provision of law, codified as O.C.G.A. § 36-30-13, provided that, in the event that all seats on the governing authority of a municipality are vacant, the election superintendent of the county shall have the authority to call for a special election to fill the vacant offices and to conduct or to appoint someone to conduct an election to fill the vacancies. In addition, the board of registrars of the county must prepare the electors list for the election. In interpreting this provision of law, the Georgia Attorney General's Office instructed the Secretary of State that the duty to call for the election to fill the vacancies was mandatory on the county election superintendent.

Based upon this law and this advice, the Election Superintendent of Burke County called for an election to be held on January 4, 1988, to fill the vacancies existing on the governing authority of the Town of Keysville. The Board of Registrars of Burke County prepared an electors list for use in the election. The call and a map depicting the municipal boundaries, as determined by the Burke County Tax Assessor, were submitted to the Attorney General of the United States pursuant to Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c) for preclearance. The Attorney General reviewed the submission and precleared the election to be conducted in conformance with the submitted material, including the map depicting the municipal boundaries of the Town of Keysville.

On December 30, 1987, certain citizens of the Town of Keysville, who are the Appellants herein, sought an

injunction from the Superior Court of Burke County to enjoin the conduct of the January 4, 1988, election. By order entered on December 31, 1987, the Superior Court of Burke County enjoined the county defendants "from undertaking any actions with regard to the scheduling or conducting of municipal elections until such time as the municipal boundaries for the town of Keysville have been properly delineated in accordance with the requirements of law."

On December 31, 1987, the Plaintiffs-Appellees, in response to the order of the Superior Court of Burke County, sought a temporary restraining order from the District Court to enjoin the enforcement of the order of the Superior Court of Burke County until such order was precleared in accordance with Section 5. The District Court granted the request for a temporary restraining order and permitted the election to be conducted on January 4, 1988.

A hearing was subsequently conducted before a three-judge panel of the District Court on the same issues and a preliminary injunction was issued continuing to enjoin the implementation of the Superior Court order until and unless the order was precleared. Upon agreement of the parties, the three-judge panel considered the issue of a permanent injunction based upon the record presented at the hearing on the preliminary injunction. On June 30, 1988, the three-judge panel issued a permanent injunction against the implementation and enforcement of the order of the Superior Court until and unless such order is precleared. From this decision, the Appellants have brought this appeal.

II.

ARGUMENT

The question presented by the Appellants in this case is whether a state court order which, in enforcing previously precleared state election law, enjoins or delays a pending election until such time as state election law is complied with, is subject to preclearance under Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c) before such order may be enforced. However, this question misstates the issue before the three-judge panel of the District Court which is now before this Court.

There is no disagreement among the parties with the principle that court orders enforcing previously precleared provisions of state law do not require preclearence in order to be effective. However, despite the characterization by the Appellants in this case, the order of the Superior Court of Burke County did not effectuate or enforce previously precleared provisions of state law. On the contrary, the order of the Superior Court of Burke County, if given effect, would result in the violation of a previously precleared practice and procedure. If given effect, the order of the Superior Court of Burke County would result in an alteration of the date of the election and the municipal boundaries of the Town of Keysville, both of which received preclearence by the Attorney General under Section 5.

The provisions of Section 5, as they apply to the State of Georgia, prevent the State of Georgia and its political subdivisions from enacting or seeking "to administer any voting qualification or prerequisite to voting, or standard,

practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," until and unless such qualification, prerequisite, standard, practice, or procedure has first been precleared either by a declaratory judgment of the District Court for the District of Columbia or by submitting the proposed change to the Attorney General of the United States.

Section 5 has been interpreted broadly to apply to all changes in laws, practices, and procedures different from those in effect on November 1, 1964, regardless of how minor the change is. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), this Court stated that the phrase "standard, practice, or procedure" must be given the "broadest possible scope." Subsequent cases have continued to underscore the broad scope of Section 5. *See, e.g., Perkins v. Matthews*, 400 U.S. 379 (1971); *Georgia v. U.S.*, 411 U.S. 526 (1973); *U.S. v. Board of Commissioners of Sheffield, Alabama*, 435 U.S. 110 (1978); *Dougherty County Board of Education v. White*, 439 U.S. 32 (1978).

The reach of Section 5 has also been given broad interpretation. This Court has not limited the application of Section 5 to merely states and their political subdivisions. This Court has held that Section 5 applies to all entities having power over any aspect of the electoral process within a jurisdiction subject to the preclearence requirements of Section 5. *See, e.g., U.S. v. Board of Commissioners of Sheffield, Alabama, supra; Dougherty Board of Education v. White, supra.* In 1982, this Court included orders of a state court within the reach of Section 5. *Hathorn v. Lovorn*, 457 U.S. 255, 265 (n.16) (1982) (" . . . a

state court decree directing compliance with a state election statute contemplates 'adminis[ration]' of the state statute within the meaning of § 5.")

The Appellants have characterized the decision of the Superior Court of Burke County as merely a "delay" in the date of the election which does not constitute a "change" under Section 5. The Appellants argue that the delay of the date of the election does not alter any election procedures and is not a permanent change which falls within the provisions of Section 5. Such arguments are wholly without merit.

This Court in deciding *NAACP v. Hampton County Election Commission*, 470 U.S. 166, 178 (1985), answered both of these arguments contrary to the position of the Appellants. In that case, this Court found that the rescheduling of the date of an election is a change under Section 5. In addition, this Court found that the fact that a change is not permanent does not exempt the change from Section 5 preclearence and stated that the "Voting Rights Act reaches changes that affect even a single election."

Therefore, the decision of the three-judge panel of the District Court is correct in its finding that the order of the Superior Court of Burke County cannot be given effect until and unless the order is precleared under the provision of Section 5.

CONCLUSION

This case presents no novel arguments concerning either the application or the reach of Section 5. The existing precedents of this Court answer every argument presented by the Appellants. Consequently, there are no substantial arguments for review by this Court and the decision of the three-judge panel should be affirmed or, in the alternative, the appeal should be dismissed.

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NO. 88-539

IN THE

Supreme Court of the United States

October Term, 1988

JAMES E. POOLE, JR., et al.,
Appellants,

vs.

EMMA GRESHAM, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether this appeal should be dismissed on the ground that the voting changes which Appellants seek to have enforced without preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, have become moot?

2. Whether voting changes directed by a state court in a covered jurisdiction which alter election procedures previously precleared by the Attorney General are subject to Section 5?

TABLE OF CONTENTS

Page

Questions Presented.....i

Statement of Object.....1

Statement of Facts.....1

Argument

I. This Appeal Should Be Dismissed as Moot.....12

II. The Questions Are Unsubstantial.....17

III. The Fact that a Jurisdiction May Be in Violation of State Law Is not a Defense for Failing to Comply with Section 5.....24

IV. The Attorney General Can Evaluate the Changes Presented.....27

V. There Is an Absence of any Conflict of Opinions.....30

Conclusion.....30

Appendix.....1a

TABLE OF AUTHORITIES

Page

Cases:

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937).....16

Allen v. State Board of Elections, 393 U.S. 544 (1969).....22

Busbee v. Smith, 549 F.Supp. 494 (D.D.C. 1982), aff'd, 459 U.S. 1166 (1983).....26

City of Atlanta v. Blackman Health Resort, 153 Ga. 499 (113 SE 545) (1922).....14

City of Lockhart v. United States, 460 U.S. 125 (1983).....25

City of Pleasant Grove v. United States, ___ U.S. ___, 107 S.Ct. 794 (1987).....22, 23

Dougherty County, Ga. v. White, 439 U.S. 32 (1978).....23

Edge v. Sumter County School District, 775 F.2d 1509 (11th Cir. 1985).....26

Epps Air service, Inc. v. Lampkin, 229 Ga. 792 (194 SE2d 437) (1972)....14

Flast v. Cohen, 392 U.S. 83 (1968).....16

Georgia v. United States, 411 U.S. 526 (1973).....23

Gresham v. Harris, Civ. No. 1:87-CV-867-JOF (N.D.Ga.).....2

Hadnott v. Amos, 394 U.S. 358 (1969)...21

Hathorn v. Lovorn, 457 U.S. 255 (1983).....20, 24, 28

In Re: Contest of Elecion Results of the Keysville Municipal Elections Held January 4, 1988, Civ. No. 88-V-21 (Sup. Ct. Burke Cty. Ga.).....9

Keysville Convalescent and Nursing Center, Inc. v. City of Keysville, Georgia, Civ. No. 88-V-280 (Sup. Ct. Burke Cty. Ga.).....11

Keysville Convalescent and Nursing Center, Inc. v. City of Keysville, Georgia, Civ. No. CV 188-183 (S.D.Ga.).....11

King Sales Co. v. McKey, 105 Ga. App. 787 (125 SE2d 684) (1962).....13

Lewis v. Price, 104 Ga. App. 473 (122 SE2d 129) (1961).....13

McCain v. Lybrand, 465 U.S. 236 (1984).....22

Migra v. Warren City School District, 465 U.S. 75 (1984).....16

NAACP, DeKalb County Chapter v. Georgia, 494 F.Supp. 668 (N.D.Ga. 1980).....26

NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985).....9, 21

Perkins v. Matthews, 400 U.S. 379 (1971).....24, 25, 26

Poole v. City of Keysville,
Georgia, Civ. No. 88-V-293
(Sup. Ct. Burke Cty. Ga.).....11

Poole v. City of Keysville, Georgia,
Civ. No. CV 188-184 (S.D.Ga.).....11

Poole v. Lodge, Civ. No.
85-V-414 (Sup. Ct. Burke Cty. Ga.)...passim

Roadway Express Inc. v. McBroom,
61 Ga. App. 223 (6 SE2d 460) (1939)..14

Rogers v. Lodge, 458 U.S. 613 (1982)...8

Smith v. Wood, 115 Ga. App. 265
(154 SE2d 646) (1967).....13

University of Tenn. v Elliott,
___ U.S.___, 106 S.Ct. 3220 (1986)...16

Williams v. Sclafani, 444 F.Supp.
895 (S.D.N.Y. 1977).....20

Constitutional Provisions:

United States Constitution,
Article VI.....26

Statutes:

84 Stat. 314.....23
89 Stat. 402.....23
96 Stat. 131.....23

Voting Rights Act of 1965:
Section 5, 42 U.S.C. §1973c.....passim

Ga. Laws 1890-91, Volume II, p. 657....3

O.C.G.A.,
§9-12-40.....13
§36-30-13.....4,5,19

Miscellaneous:

28 CFR,
§51.12.....22
§51.17(a).....18
§51.17(b).....20
§51.49.....29
§51.51.....29
§51.54(d).....26
§51.54 - 61.....28

18 E.G.L. Judgments & Decrees,
§284.....13
§285.....13
§306 13

S.Rep. No. 97-417 (1982), U.S.
Code & Admin. News 1982.....23

Supreme Court Rules,
Rule 16.1(c).....1

No. 88-539

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JAMES E. POOLE, JR., et al., Appellants,

v.

EMMA GRESHAM, et al., Appellees.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1(c) Appellees move to dismiss this appeal on the ground that the appeal is not within this Court's jurisdiction, or in the alternative to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF FACTS

Appellees are black residents of

Keysville, Georgia, a majority black municipality of approximately 300 people in rural Burke County. Although Keysville was chartered in 1890, prior to the election held on January 4, 1988, the town had not held an election or had any municipal officials since approximately 1933. The election in January was conducted pursuant to the order of the three-judge court in this case, Gresham v. Harris, Civ. No. 1:87-CV-867-JOF (N.D.Ga.), J.S.App., pp. A-1 - A-25, and the Attorney General's preclearance of new election procedures under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c,

Restoration of elected government in Keysville has been a battle fought overtly on racial lines. Blacks have strongly supported restoration because of their need for municipal services, such as water and sewerage and police and fire protection. Whites have adamantly opposed restoration because they do not wish to be governed by black elected

officials or pay for municipal services. Whites have repeatedly argued that the municipal boundaries of the town were undeterminable and that as a consequence elections could not be held.[1]

In an attempt to restore city government Appellees and other black residents of Keysville organized a town meeting in 1985 and chose superintendents to conduct new elections. Appellants, who are white and are opposed to restoration of municipal government, filed a law suit, Poole v. Lodge, Civ. No. 85-V-414 (Sup. Ct. Burke Cty. Ga.), and secured an injunction against the elections

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1. They contend that the location of the schoolhouse, which was designated as the center of town in the 1890 act of incorporation, Ga. Laws 1890-91, Volume II, p. 657, and which was destroyed many years ago in a storm, is presently unknown and that as a consequence it is impossible to establish the boundaries of the town and conduct elections. Whites have also resorted to scare tactics telling elderly blacks that if government were restored they would lose their homes and racial violence would result.

until county officials complied with all requirements of state law, including determining the municipal boundaries of Keysville.

Appellees filed the instant law suit on April 29, 1987 seeking declaratory and injunctive relief against the Governor for failing to appoint persons to the vacant city offices pursuant to state law. Also in 1987, the Georgia General Assembly enacted a statute for the purpose of establishing a method of restoring municipal government to Keysville by providing that in the event all the offices of a municipality were vacant, "the election superintendent of the county in which the municipality is located shall have the authority to call for a special election to fill the vacant offices and to conduct...the special election." O.C.G.A. §36-30-13. The statute also authorized the board of registrars for the county to prepare a list of electors for the election.

The Attorney General of Georgia advised the Secretary of State by letter in August, 1987, that the new law was mandatory and that the election superintendent of Burke County was required to call and conduct special elections for Keysville.

After Section 5 preclearance of §36-30-13, Appellees moved to amend their federal complaint to add county officials as defendants charging that they had failed to call elections for Keysville as required by the new statute. Following the filing of the motion to amend, the election superintendent of Burke County, pursuant to §36-30-13, called an election for Keysville for January 4, 1988.

The call and date for the election, together with a map designating the boundaries of the town to be used in determining voter eligibility, were prepared by county officials and submitted to the Attorney General pursuant

to Section 5 of the Voting Rights Act.[2] The submission was precleared on December 9, 1987. A copy of the preclearance letter is appended hereto at 1a.

On December 3, 1987, the plaintiffs in Poole v. Lodge, supra (Appellants here), filed a motion in their state court law suit to enjoin the January election on the ground that the boundaries of the town were undetermined. The court granted the motion and on December 31, 1987 entered an order enjoining the Keysville elections and further enjoining county officials from "undertaking

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2. The map was prepared by the county tax assessor based upon his review of various deeds and plats recorded in the county courthouse. J.S.App., pp. A-66 - A-70. The county board of registrars then used the map to prepare the list of eligible voters for the January elections. Id., p. A-72. In submitting the map for preclearance, the county attorney advised the Attorney General that while setting the town boundaries "has been one of the problems that has confronted the county...we now believe that the boundaries have been reasonably determined, and the election can go forward."

any actions with regard to the scheduling or conducting of municipal elections until such time as the municipal boundaries for the town of Keysville have been properly delineated in accordance with the requirements of law." J.S.App., p. A-48. The court also held that its order "is not subject to Section 5 preclearance." Id.

Appellees then filed a motion in this case for a temporary restraining order and a preliminary injunction enjoining county officials from implementing any of the voting changes in the state court order absent preclearance under Section 5. The district court as a single-judge court allowed Appellants (plaintiffs in Poole v. Lodge, supra) to participate in the hearing and over their objections, but with the consent of the Attorney General of Georgia and Burke County officials, issued a temporary restraining order on December 31, 1987 permitting the elections to go forward. J.S.App., p. A-11.

On the day of the elections, Joseph Cochran, Sr. (who later contested the results of the election along with Appellant Muns and others) and Hassie Cochran filed an action with the Burke County board of registrars and the superintendent of elections challenging the eligibility of 41 town electors on the ground that the boundaries of the town had not been determined and that the residency of the voters could not be established. The challenge was heard and dismissed. There was no appeal. J.S.App., pp. A-79 - A-80.

There were two slates of candidates in the elections, one favoring restoration of municipal government and having the support of black residents, and the other opposing restoration and having the support of white residents. Voting in the elections was sharply polarized on the basis of race. See, J.S.App., p. A-80, and Rogers v. Lodge, 458 U.S. 613, 623 (1982) (finding "overwhelming evidence of bloc voting along racial lines" in

elections for the Burke County Commission"). Appellee Gresham was elected mayor and Appellees C. Neely, M. Holland, A. Lewis and Morris were elected as members of council. Appellant Poole, who had only write-in opposition, was elected as the fifth council member.

Immediately after the January elections, local whites, including Appellant Muns, filed a challenge to the results alleging that the boundaries of the town were indeterminable and that it was impossible to ascertain who was a qualified voter or candidate. The contest was denied and the state court affirmed the results of the election "based upon the map and voter's list as submitted by the Burke County Board of Registrars and precleared and approved by the United States Attorney General." In Re: Contest of Election Results of the Keysville Municipal Elections Held January 4, 1988, Civ. No. 88-V-21 (Sup. Ct. Burke Cty. Ga.), J.S.App., p. A-86. The

contestants did not appeal.

On January 14, 1988 the district court as a three-judge court held a hearing on Appellees' motion for a preliminary injunction. The court granted the motion to intervene filed by Appellants and over their objections, but again with the consent of the Attorney General of Georgia and Burke County officials, granted preliminary injunctive relief. Thereafter, on June 30, 1988 the three-judge court granted permanent injunctive relief finding that the state court order "changed a previously precleared practice and therefore should also have been precleared." J.S.App., p. A-24. Appellants appealed to

this Court.[3]

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3. Since their election, the mayor and council have tried to govern Keysville - despite strong opposition by whites. In April, 1988 they adopted a license ordinance charging a small tax for conducting business in Keysville. In July, 1988, pursuant to the petition of affected land owners, they agreed by ordinance to annex certain areas adjacent to the town as designated on the map used to determine residence of voters in the January municipal elections.

The Keysville Convalescent and Nursing Center, Inc., which is owned and operated by Appellants Marshall and Harmon, filed suit against the town in state court on August 11, 1988 seeking a declaration that it was not required to pay a license fee or tax because it was impossible to tell if the nursing center was inside or outside the boundaries of the town. See, Keysville Convalescent and Nursing Center, Inc. v. City of Keysville, Georgia, Civ. No. 88-V-280 (Sup. Ct. Burke Cty. Ga.). A second group of whites, including Appellants Poole, Muns, Way, Marshall and Harmon, filed another suit against Keysville on August 24, 1988 in state court seeking a declaration that the proposed annexation was null and void on the ground that the boundaries of the town were indeterminable. See, Poole v. City of Keysville, Georgia, Civ. No. 88-V-293 (Sup. Ct. Burke Cty. Ga.). The City of Keysville removed both state court cases to federal court where they are presently pending. See, Poole v. City of Keysville, Georgia, Civ. No. CV 188-184 (S.D.Ga.), and Keysville Convalescent and Nursing Center, Inc. v. City of Keysville, Georgia, Civ. No. CV 188-183 (S.D.Ga.).

ARGUMENT

I. This Appeal Should Be Dismissed as Moot

Since entry of the order in Poole v. Lodge, supra, which held that the boundaries of Keysville were undetermined, the Burke County board of registrars in a challenge to eligible voters and the Superior Court of Burke County in an election challenge have issued final judgments, based upon the Attorney General's intervening preclearance, that the boundaries of Keysville have been legally determined for purposes of conducting elections. J.S.App., pp. A-79 - A-80, A-86. Under Georgia law both of these decisions are entitled to res judicata or preclusive effect as far as the plaintiffs in Poole (Appellants here) are concerned.

Res judicata is a rule of law applied in Georgia that a final judgment or decree on the

merits by a court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points or matters determined in the former suit or which might have been put in issue. O.C.G.A. §§ 9-12-40; Lewis v. Price, 104 Ga. App. 473, 474-75 (122 SE2d 129)(1961); 18 E.G.L. Judgments & Decrees, §§285, 306. Under the related doctrine of estoppel by judgment, or collateral estoppel, a party in a second suit may be precluded from asserting one or more facts which were actually decided in a former suit, although the two suits were for different causes of action, and all the parties to the two suits were not identical. Smith v. Wood, 115 Ga.App 265, 266-67 (154 SE2d 646) (1967); King Sales Co. v. McKey, 105 Ga.App. 787, 788-89 (125 SE2d 684) (1962); 18 E.G.L., supra, §§ 284, 306.

The final decision of an administrative body, such as the county board of registrars, is also entitled under Georgia law to res

judicata and preclusive effect. City of Atlanta v. Blackman Health Resort, 153 Ga. 499, 509-10 (113 SE 545) (1922); Epps Air Service, Inc. v. Lampkin, 229 Ga. 792, 795 (194 SE2d 437) (1972).

The judgments here were rendered by a court and an administrative body of competent jurisdiction. The judgments were final and resolved the merits of the plaintiffs' claims that the boundaries of Keysville were undetermined for purposes of conducting elections. Appellant Muns, who is one of the plaintiffs in Poole v. Lodge, supra, and who is in privity with the other plaintiffs, i.e., he is identified in interest with them, Roadway Express Inc. v. McBroom, 61 Ga.App. 223, 226 (6 SE2d 460) (1939), was also one of the parties in the state election challenge. Joseph Cochran, Sr., who was one of the parties in the state election challenge along with Appellant Muns, was also a party in the state challenge to eligible voters. Thus, the

plaintiffs in Poole have an identity of interests with the plaintiffs in the two intervening state judgments such that they are bound by those judgments that the boundaries of Keysville have been legally determined for purposes of conducting elections. There is a similar identity of interests or privity among the defendants in Poole v. Lodge, supra, and the defendants in the challenge to eligible voters and the challenged winners of the January election (accepting Appellant Poole).

The plaintiffs in Poole are now bound by the intervening state judgments and may no longer argue that the boundaries of Keysville are undetermined for purposes of holding elections. The boundaries, as the state judgments provide, have been so determined. The Poole litigation, accordingly, is now

moot.[4]

The issue before this Court, therefore, is whether the state court order in Poole, now moot, should be submitted for preclearance. Since the order can no longer be enforced under state law, any decision concerning the propriety of its submission under Section 5 would be purely advisory and would not arise in the context of a continuing case or controversy. Such a decision would be beyond the power of this Court to give. Flast v. Cohen, 392 U.S. 83, 94-5 (1968); Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 239-40 (1937). Accordingly, this appeal should be dismissed as moot.

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4. Having had a full and fair opportunity to litigate their claims in state judicial or quasi-judicial forums, Appellants are bound by the fact finding of those tribunals in federal court as well. Migra v. Warren City School District, 465 U.S. 75 (1984); University of Tenn. v. Elliott, ___ U.S. ___, 106 S.Ct. 3220, 3227 (1986).

II. The Questions Are Unsubstantial

It is undisputed that Appellants, a group of disgruntled whites who oppose the restoration of municipal government in Keysville, are the only parties contending that preclearance of the voting changes contained in the state court order is not required. J.S.App., p. A-16. The Attorney General of Georgia and the election officials of Burke County agree with Appellees that the new voting procedures at issue are subject to preclearance under the Voting Rights Act.

The issues presented in this appeal are narrow. Appellants do not dispute that Keysville is covered by Section 5 or that voting changes directed by state courts, including changes in the dates of elections, are subject to preclearance. J.S., pp. 29, 35, and J.S.App., p. A-15. Appellants' argument is that the state court did not in fact direct the implementation of any voting changes, J.S., p. 33, but that even if it did,

the changes were incident to the enforcement of previously precleared state law and are therefore not subject to Section 5 review. J.S., p. 40.

Appellants' first contention is plainly incorrect. As the three-judge court found, "it is clear that the order did, at the least, change the date of the election, if not halt it altogether. A change in the date of an election...requires approval by the Attorney General under section 5. NAACP v. Hampton County Election Commission, 470 U.S. 166, 178 (1985)." J.S.App., p. A-17. Department of Justice regulations governing the administration of Section 5 are in agreement. See, 28 CFR §51.17(a)("The conduct of a special election...is subject to the preclearance requirement to the extent that the jurisdiction makes changes in the

practices or procedures to be followed.").[5]

Appellants' second contention, as the three-judge court found, is simply contrary to the prior decisions of this Court. In NAACP v. Hampton County Election Commission, 470 U.S. 166 (1985), the Department of Justice precleared on November 19, 1982 a state statute calling for special elections for a county school board to be held at the time of the November general election. Following the belated preclearance, county officials set March 15, 1983 as a new date for the election. They contended, precisely as the Appellants do here, that "because the rescheduling [of the election] in this case

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5. Other voting changes in the state court order included altering or denying the authority of election superintendents to call elections and registrars to define the electorate and prepare voters' lists pursuant to O.C.G.A. §36-30-13, and ruling that the town boundaries could not be determined at all when county officials had concluded otherwise. J.S.App., p. A-21.

was merely an administrative effort to comply with a statute that had already received clearance, it was not a change of such magnitude as to trigger the requirements of § 5." 470 U.S. at 178, 180. This Court disagreed. It held that the disputed change was required to be precleared under Section 5. 470 U.S. at 181.

Appellants' reliance upon the district court's opinion in Williams v. Sclafani, 444 F.Supp 895 (S.D.N.Y. 1977) is misplaced. As the three-judge court noted here, the holding in Williams was based largely on the district court's conclusion that state court orders were exempt from Section 5 review. J.S.App., pp. A-20 - A-21; 444 F.Supp. at 903-04. That holding was repudiated by Hathorn v. Lovorn, 457 U.S. 255 (1983), decided five years later.

Appellants concede that the scheduling of an election by the state court, even if undertaken to comply with previously precleared state law, would be a voting change

required to be precleared under Section 5. J.S., p. 29 ("Appellants further recognize that if the State Court's Order were to be enforced, the scheduling of any subsequent special election would have to be precleared with the Attorney General."), and pp. 34-5. Accord, 28 CFR §51.17(b)("Any discretionary setting of the date for a special election or scheduling of events leading up to or following a special election is subject to the preclearance requirement."). Appellants do not explain, however, why the setting of an election date should be covered by Section 5 while the alteration of the date, or the halting, of elections should not be covered by Section 5. Both have the potential for discrimination and for that reason both are covered by Section 5. NAACP v. Hampton County Election Commission, supra, 470 U.S. at 181. Also see, Hadnott v. Amos, 394 U.S. 358, 365-66 (1969)(rescheduling of a candidate qualifying period is a covered voting

change).[6]

There is no basis in Section 5 jurisprudence for the distinction urged by the Appellants in this case. As this Court has repeatedly stated, Section 5 must be given "the broadest possible scope" to reach any practice "which alter[s] the election law of a covered State in even a minor way." Allen v. State Board of Elections, 393 U.S. 544, 566-67 (1969); City of Pleasant Grove v. United States, ___ U.S. ___, 107 S.Ct. 794, 798 (1987). Also see, 28 CFR §51.12 (1987) (requiring the submission of any change in voting "even though it appears to be minor or indirect").

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6. While the merits of the changes in question are not involved in this appeal, McCain v. Lybrand, 465 U.S. 236, 250 (1984), there is no doubt that they have the potential for discrimination. The effect of implementation of the new procedures would be to turn recently elected black officials out of office and disfranchise minority voters in Keysville.

This Court has consistently defined Section 5 broadly, stressing that the statute is not a mere inventory of voting procedures but is concerned with "the reality of changed practices as they affect Negro voters." Georgia v. United States, 411 U.S. 526, 531 (1973). Congress, expressly approving the broad definition of Section 5 adopted by this Court and the Attorney General, has extended the preclearance provisions of the Voting Rights Act on three different occasions, in 1970, 1975 and 1982. 84 Stat. 314; 89 Stat. 402; 96 Stat. 131; City of Pleasant Grove v. United States, supra, 107 S.Ct. at 798; Dougherty County, Ga. v. White, 439 U.S. 32, 38-9 (1978); S.Rep. No. 97-417, p. 9 (1982), U.S. Code & Admin. News 1982, p. 186.

Given the broad scope of Section 5, the settled case law and the legislative history of the statute, the question whether the voting changes at issue in this appeal are subject to prelearance is so unsubstantial as

not to warrant further argument.

III. The Fact that a Jurisdiction May Be in Violation of State Law Is not a Defense for Failing to Comply with Section 5

The fact that a covered jurisdiction may be in violation of state law is no basis for non-compliance with Section 5 when it seeks to implement a voting change. In Perkins v. Matthews, 400 U.S. 379 (1971), the City of Canton, Mississippi elected its aldermen by ward elections in violation of a 1962 state law that required aldermen to be elected at-large. At the elections in 1969, the city, in an effort to comply with state law, attempted to implement at-large elections. In an action by local voters and candidates to require preclearance of the at-large elections, the city argued that it had no other choice than to comply with the 1962 state law in the 1969 elections and that doing so was not a change in voting subject to Section 5. This Court held that conducting at-large elections, even

if district elections were in violation of state law, was a change in voting that could not be implemented without Section 5 preclearance. Accord, City of Lockhart v. United States, 460 U.S. 125, 132 (1983)(whether local officials were seeking to act in conformity with state law was "essentially irrelevant" in evaluating the effect of a voting change); Hathorn v. Lovorn, supra, 457 U.S. at 256, n. 16 ("§ 5 comes into play whenever a covered jurisdiction departs from an election procedure that was "in fact 'in force or effect'...on November 1, 1964." Perkins v. Matthews").

By analogy to Perkins, even if the elections in Keysville were in violation of state laws governing the location of municipal boundaries, or were in violation of a state court order, the county's failure to conduct the elections would still be a covered

change.[7] Such a result is compelled, not only by the decisions of this Court, but by the Supremacy Clause of Article VI of the Constitution.

Appellants complain that if the decision of the three-judge court were affirmed it would deprive state courts of the ability to enforce state election laws. J.S., pp. 30-

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7. The benchmark for determining a voting change is ordinarily the practice in force or effect on November 1, 1964. Perkins v. Matthews, supra, 400 U.S. at 395. As the three-judge court found, however, where intervening changes have been enacted and precleared they become the appropriate benchmark for determining voting changes and administering Section 5. J.S.App., p. A-18. Also see, Busbee v. Smith, 549 F.Supp 494, 498 (D.D.C. 1982)(voting change was a congressional reapportionment enacted in 1981 different from that enacted in 1972), aff'd, 459 U.S. 1166 (1983); Edge v. Sumter County School District, 775 F.2d 1509, 1512 (11th Cir. 1985)(a court should ordinarily reinstate "the last valid plan in effect" in fashioning a Section 5 remedy); NAACP, DeKalb County Chapter v. Georgia, 494 F.Supp. 668, 676 (N.D.Ga. 1980); 28 CFR §51.54(d)("the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction").

1. To the contrary, states are always free to enforce their election laws, provided they do so in conformity with Section 5.

IV. The Attorney General Can Evaluate the Changes Presented

Appellants argue that preclearance should not be required of the changes directed by the state court because they are not capable of being evaluated by the Attorney General or the United States District Court for the District of Columbia. J.S., p. 44. To demonstrate this alleged difficulty of evaluation, Appellants pick out four of the factors listed in the Section 5 regulations which the Attorney General may consider in resolving a submission, e.g., the extent to which minorities were consulted or whether their concerns were taken into account. J.S., p. 42. The regulations, however, provide that the Attorney General should also consider, inter alia, the requirements of the

constitution and statutes designed to safeguard the right to vote and the relevant decisions of the Supreme Court and other federal courts. 28 CFR §§51.54 - 61. Not every factor identified in the regulations will be relevant in every case, but the Attorney General would surely be able to evaluate the purpose and effect of the changes involved in this appeal under existing Section 5 standards, which are far more extensive than Appellants have indicated.[8]

In addition, the Attorney General would not be required to "second guess" the state court judge. J.S., p.43. The Attorney General considers only whether a voting change is free of racial purpose or effect in light

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8. Appellants concede, as they must, that the court ordered changes in Hathorn v. Lovorn, supra, would be "easily" reviewable under Section 5. J.S., p. 43. Their analysis fails to explain, however, why the changes involved here should be regarded any differently.

of applicable constitutional, statutory and decisional voting rights law. 28 CFR §51.51, et seq. By granting preclearance he does not certify that a submission "satisfies any other requirement of the law beyond Section 5." 28 CFR §51.49. The Attorney General is not, therefore, an appellate body reviewing the merits of state court orders, either under state law or non-Section 5 standards. The Attorney General in fact does not review state court orders as such, but only voting practices enacted or implemented by covered jurisdictions - including those directed by state courts.

The voting changes which county officials were directed to implement in this case can be easily evaluated by the Attorney General or the United States District Court for the District of Columbia under current Section 5 standards.

V. There Is an Absence of any Conflict of Opinions

The decision of the three-judge court should be affirmed because there is an absence of any conflict between it and the decisions of this Court and lower federal courts.

Conclusion

This appeal should be dismissed on the ground that the appeal is not within this Court's jurisdiction. In the alternative the judgment sought to be reviewed on appeal should be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Respectfully submitted,

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December 9, 1987

Preston B. Lewis, Jr., Esq.
Burke County Attorney
P. O. Box 62
Waynesboro, Georgia 30830

Dear Mr. Lewis:

This refers to the reestablishment of the Town of Keysville governed by a mayor and five councilmembers elected at large, with numbered positions and a majority vote requirement, to one-year concurrent terms with municipal elections held on the first Monday in January, the establishment of a polling place, and the procedures for conducting the January 4, 1988, special election for the town in Burke County, Georgia, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We recieved your initial submission on September 15, 1987; supplemental information was

received on November 10, November 20, and November 24, 1987. In accordance with your request, expedited consideration has been given this submission pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.34).

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See also 28 C.F.R. 51.41 and 51.43.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: s/Mark A. Posner
For Gerald W. Jones
Chief, Voting Section